82-98

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ALEXANDER L. STEVAS,
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

NO.

JOHN SCALZITTI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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THE QUESTIONS PRESENTED FOR REVIEW.

1. Is a government immunity letter pertaining to a plea arrangement between a confidential informant and the government admissible into evidence when the letter includes explicit or implied verifications by the government as the confidential informant's reliability and truthfulness and also contained a reference to a polygraph verification?

2. Has the District Court departed from the accepted and usual course of judicial proceedings by submitting only a portion of the instructions to the jury in writing without further instructing the jury that the written portion must only be considered along with its oral instructions previously given?

3. Has the District Court, in its consideration of the facts in the sentencing of the Petitioner, John Scalzitti, disregarded the criteria as set down by the United States Supreme Court and by decisions of the various Federal Courts of Appeals or does such consideration depart from the accepted and usual course of judicial proceedings?

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PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit dated May 17, 1982.

CITATION TO OPINIONS BELOW.

There was no opinion of the District Court for the Western District of Pennsylvania. The Opinion, in the form of a Judgment Order, of the United States Court of Appeals for the Third Circuit is not yet officially reported, but is set forth in Appendix A hereto.

JURISDICTION.

The Judgment Order of the Court of Appeals in Appendix A herein was dated May 17, 1982 and issued in lieu of a formal mandate on June 8, 1982. No Petition for Rehearing was filed before the Court of Appeals and this Petition is being filed within the sixty day limitation as set forth in Rule 20.1 of the Rules of the Supreme Court of the United States. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED.

The statute involved relative to argument of the Petitioner herein relating to the submission of written instructions to the jury is provided in Title 18 U.S.C. § 3755 which provides as follows:

> "No limitation shall be placed on the information concerning the background, character and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

STATEMENT OF THE CASE.

A. PROCEDURAL HISTORY.

The case was based upon a three count Indictment filed March 25, 1981, which charged in the first count, the Defendants, John Scalzitti, Louis Raucci and Robert Allen Weldon, also known as Bobby Allen, with on or about January 23, 1981, through, on or about March 5, 1981, knowingly, intentionally and unlawfully conspiring together and with one another to distribute and possess with the intent to distribute cocaine hydrochloride; and, in the second count, the Defendants, Mr. Scalzitti and Mr. Weldon, with on or about March 5, 1981, knowingly, intentionally and unlawfully, distributing cocaine hydrochloride; and, in the third count, the Defendants, Mr. Scalzitti and Mr. Weldon, with on or about March 5, 1981, possessing with the intent to distribute cocaine hydrochloride.

The Petitioner herein, John Scalzitti, was convicted after a jury trial on July 2, 1981. On September 11, 1981, sentencing was held and the District Court sentenced this Petitioner to five years imprisonment on Count I, and five years imprisonment and special parole as to Count II, with Count I to run concurrently with Count II. On September 15, 1981, the Petitioner, John Scalzitti, filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit.

Without opinion and by Judgment Order, the United States Court of Appeals for the Third Circuit affirmed the Judgment of the District Court of the Western District of Pennsylvania.

B. STATEMENT OF FACTS.

The case consisted basically of testimony produced by the government through the use of wiretaps, both personally and telephonically; the main witness for the government being Mr. Charles Hindmarsh, who testified pursuant to an agreement with the United States Government and which witness was granted entry into the Federal Witness Protection Program. The credibility of Mr. Hindmarsh was involved in the matter and objections were made to the admissibility of the plea arrangement with Mr. Hindmarsh, which the District Court permitted.

The facts basically were that Mr. Hindmarsh, because of his prior acquaintance with Mr. Scalzitti, could arrange a drug transaction of a large magnitude and that undercover agents were used to perpetrate an alleged sale. Ultimately, Mr. Weldon became involved in the transaction, based on the testimony, and a sale, in fact, occurred of a small amount of a substance subsequently identified as cocaine hydrochloride.

The government's main witness was one Charles Hindmarsh. He fits the time honored role of the criminal turned government helper. In return for his cooperation, the government bestowed various gratuities upon Mr. Hindmarsh. They are documented in part in a letter from our government to Mr. Hindmarsh.

The Defendants, however, complained of reference to the inclusion as evidence of a certain portion of said letter and references thereto. Specifically, counsel for Defendant Weldon made clear that he objected to any reference to the following portions of the agreement:

"MR. SHARON: Can I just read into the record the specific portion of his letter I'm objecting to so it's made clear?

THE COURT: Sure.

MR. SHARON: The United States will agree that as long as Mr. Hindmarsh provides full, complete and truthful information to the United States no statement which he makes will be used against him in any further prosecution except for a prosecution for perjury or giving a false statement. Mr. Hindmarsh must understand that in this regard he must provide full, complete, and truthful testimony to any federal grand or petit jury or court considering any matter to which his information may apply, that the determination as to whether Hindmarsh has given full, complete, and truthful cooperation will be made by the United States and polygraph verification may be used by the United States in this regard."

The Government argued, and the District Court agreed, that the jury is entitled to be made aware of all terms of a plea agreement.

In the present case, the jury had begun its deliberations on the afternoon of July 1, 1981. The Honorable Alan N. Bloch had previously provided the jury with lengthy oral instructions.

After having deliberated for approximately ten hours, the jury requested additional instructions on conspiracy, indicating a confusion with the Judge's original charge. The District Court, over the Defendants' objections, submitted in writing that portion of its oral charge which covered conspiracy.

Subsequently, at the time of sentencing herein before the District Court, the United States Attorney presented extensive argument relative to the Petitioner's reputation and other matters not a part of the record. In order to fully examine the basis and weight given by the District Court for the imposition of the sentence, it is necessary to review the District Court's indications that were given at the time of sentencing. In summarizing the case, the District Court indicated that:

"(a) the Defendant Scalzitti sold to an FBI Agent a quantity of 100% pure cocaine;

(b) that prior to that sale, the Defendant Scalzitti bragged that he could deliver enormous quantities of cocaine;

(c) that the Defendant Scalzitti enticed another individual to join him in the crime;

(d) that reputed ties to organized crime are also very, very troubling;

(e) that the Defendant Scalzitti invested very large sums of money in business operations with no means to accumulate large sums;

(f) that the Defendant Scalzitti presented the possibility of being able to unleash into the community large quantities of dangerous and debilitating drugs."

The Petitioner's arguments herein are related to the admissibility of the letter pertaining to the plea agreement between the United States Government and the confidential informant, the transmission to the jury of partial written instructions and the use of the materials set forth in the sentencing hearing of this Petitioner.

JURISDICTION IN THE COURT OF FIRST INSTANCE.

The jurisdiction of the District Court for the Western District of Pennsylvania relative to this case is based upon a violation of the Federal Criminal Statutes and, more particularly, violations of 21 U.S.C. §§841(a)(1) and 846, and 18 U.S.C. §2.

REASONS FOR GRANTING THE WRIT.

I.

It is Petitioner's contention that the immunity letter offered by the government and accepted into evidence over objection of this Petitioner is in violation of numerous decisions of this Court and of the various circuit courts in the United States.

An analysis of the decisions relative to plea agreements and the admissibility thereof is necessary to determine the status of the law in the circuit courts and in this Court.

It is true that evidence that a witness is testifying pursuant to a plea agreement is usually admissible to show bias. United States v. Goodman, 605 F2d 870, 880 (5th Cir.1979). In most instances, a plea agreement may be portrayed fully and placed in context so the jury is not misled about its terms or importance. United States v. Rosson, 441 F2d 242, 244 (5th Cir.1971) cert den, 404 U.S. 843 (1971).

However, this proposition is not without its limitations. Reference to irrelevant or prejudicial matters within a plea agreement are not admissible. See, e.g. United States v. Arroys-Angulo, 580 F2d 1137, 1145 (2d Cir.1978) (fact that a witness' family is in protective custody excluded); United States v. Cochran, 499 F2d 380 (5th Cir.1974) (prosecutor's representation that a guilty plea is wisely negotiated in light of overwhelming evidence is inadmissible).

Recently, the issue has arisen as to whether a plea agreement to testify truthfully

is admissible. The First Circuit has held that admitting a promise of truthfulness was not plain error. United States v. Miceli, 466 F2d 256 (1st Cir.1971) However, the Miceli Opinion implies that over a proper objection the promise should not have been admitted. Perhaps the best discussion of the inherent dangers of inclusion of a plea agreement to testify truthfully is contained in United States v. Roberts, 618 F2d 530 (9th Cir.1980), cert den, 101 S.C. 88 (1980). Judge Wright stated:

> "A strong case can be made for excluding a plea agreement promise of truthfulness. The witness, who would otherwise seem untruthworthy, may appear to have been compelled by the prosecutor's threats and promises to come forward and be truthful. The suggestion is that the prosecutor is forcing the truth from his witness and the unspoken message is that the prosecutor knows what the truth is and is assuring its revelation." Id., 536.

Judge Wright offers a cogent analysis. A prosecutor may never explicitly vouch for the truthfulness of his witness. Lawn v. United States, 335 U.S. 339, 359 N. 15 (1958). See, e.g. Gradsky v. United States, 373 F2d 706, 710 (5th Cir.1972) (Improper to imply government checks for credibility before using witness) In Roberts, supra, Judge Wright warns that conveying a message by implication that the government is vouching for a witness' credibility is equally improper. The record must be examined to determine if such an implicit voucher of the credibility of the confidential informant, Hindmarsh, exists.

Let us view point by point the implications contained herein concerning the ramifications of Hindmarsh's testimony:

(1) the witness must at all times offer truthful testimony;

(2) the government will be the sole determiner of the truthfulness of the testimony;

(3) if you offer truthful testimony (as determined by the government):

(a) you will not be prosecuted for perjury;

(b) you will be given probation on a wire fraud case as well as a robbery case in Westmoreland County;

(4) the government may not ethically offer perjured testimony (United States v. Jackson, 579 F2d 533 (10th Cir.1978), cert den, 99 S.Ct. 569;

(5) the government has decided:

(a) to give you probation on the wire fraud charge;

(b) not to prosecute you for perjury;

(c) to offer your testimony at trial.

It does not take a Socratic scholar to draw the next inference, i.e. that, therefore, the government believes the testimony of Hindmarsh is truthful. The effect of the government's presentation of Hindmarsh's testimony at the present trial is highlighted by the fact that Hindmarsh, with the government's knowledge, knowingly lied to an FBI Agent. To now present the reborn Hindmarsh further

vouches for the fact that the government believes that this time Hindmarsh is being truthful. In other words, the leopard has changed its spots. Vouching for his credibility is no less clear under these circumstances than had the prosecutor erected a monument for Hindmarsh. It is well to remember the words of Judge Friendly concerning such tactics:

> "They inevitably give jurors the impression that the prosecutor is carefully monitoring the testimony of the cooperating witness to make sure that the latter is not stretching the facts -- something the prosecutor usually is quite unable to do, . . . If proper objection had been made to the summation, the judge should have sustained it; if matters had gone too far to make a striking of the remarks an effective cure, the judge should have instructed that the promise in the cooperation agreement adds little to the truth-telling obligation imposed by the oath; that the prosecutor often has no way of knowing whether the witness is telling the truth or not; that the books are not filled with perjury indictments of government witnesses who have gone beyond the facts; and that an acquittal would not mean that as a matter of course the government would seek such an indictment or even fail to make its promised recommendation of leniency. If prosecutors know that such instructions will be given, they will hardly be tempted to the excesses committed here." United States v. Arroyo-Angulo, 580 F2d 1137, 1130 (2nd Cir.1978) (Concurring Opinion)

The Ninth Circuit in Roberts, supra, stated that if such implied inference is made use of by the prosecutor in his closing argument, reversal is mandated. Here, Mr. Antkowiak cleverly used the implications contained herein to impliedly suggest that the government is satisfied that Mr. Hindmarsh's testimony is now truthful. The skilled prosecutor in his closing argued that Hindmarsh now had a great deal to lose if he lied (i.e., if the government determined he was lying). The man could be prosecuted for perjury. Lying would topple a lucrative plea bargain and, of course, since he was to be given probation for the wire fraud and robbery and since he was not prosecuted for perjury, he must be now telling the truth (i.e., the government is satisfied he is telling the truth).

Once the government becomes the initial arbiter of the witness' truthfulness, and the jury becomes aware that the penalties, which attach once a determination by that arbiter that the witness is lying is made, have not attached, the government's imprimatur is clearly seen. Mr. Antkowiak in his closing dispelled any question as to this proposition.

Here, the dangers raised in Roberts, supra, as to the implicit vouching by the government of a witness' truthfulness have materialized. This analysis clearly establishes that the lower court has departed from the accepted and usual course of judicial proceedings in admitting the plea agreement in its entirety and that the lower court has departed from the decisions of this Court and of various circuit courts in the United States. The issue as to the representation or at least the implied representation by the government of a witness' truthfulness is of such importance and is raised in

numerous trials not only in federal courts but also state courts of all jurisdictions that this Court should address the question and set a standard so as to clearly indicate the inadmissibility of documents which clearly imply the government's voucher for the truthfulness of a witness especially when reference is made to inadmissible verification of the same, being the polygraph examination.

Based on these reasons, the Petitioner respectfully submits that the Court should grant the Writ of Certiorari herein and address itself to this issue.

II.

The Petitioner next contends that the submission to the jury of written instructions where the instructions pertain only to a portion of the original oral instructions is such a departure from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision.

It is also Petitioner's contention that the circuit courts have inconsistently applied standards concerning the submission of written instructions to the jury.

To determine the propriety of Petitioner's allegations, it is first necessary to examine the principles of law surrounding submission of written instructions to a jury. The Petitioner recognizes that the question of whether a criminal charge should be reduced to writing and furnished to the jury for their use in their deliberations is discretionary with the trial court. McDaniel v. United States, 343 F2d 785 (5th Cir.1965) cert den, 382 U.S. 826 (1965) See also, United States v. Johnson, 466 F2d 537 (8th Cir.1972) cert den, 409 U.S. 1111 (1973); United States v. Brighton Building and Maintenance Co., 598 F2d 1101 (7th Cir.1978) cert den, 444 U.S. 840 (1979) Similarly, the Petitioner admits that the trial judge has substantial latitude in tailoring the jury instructions so long as they fairly and adequately cover the issues presented. United States v. James, 576 F2d 223 (5th Cir.1978).

Nevertheless, there remain various pitfalls a court must avoid. A court must always be cautious not to over-emphasize any one part of the charge or otherwise direct the jury's attention to an isolated segment of the

instructions. United States v. Schilleci, 545 F2d 519 (5th Cir.1977). Recognizing this possibility of over-emphasis of a part of the instructions has given rise to a condemnation of the practice of submitting to the jury during its deliberations written instructions as to a portion of the oral charge which had been previously given. United States v. Perez, 648 F2d 219 (5th Cir.1981); United States v. Schilleci, supra.

The danger of the jury giving undue weight to this portion of the charge submitted in writing is evident. Yet, the error of submitting such partial instructions in writing has not been held to be error per se. Schilleci, supra, suggests that prejudice manifests itself when:

> "(1) the court submits in writing a part of its oral charge to the jury during its deliberations;
>
> (2) and fails to instruct the jury to consider the written instruction along with its oral instruction as an integrated whole." Id., 529.

In the context of the general principles surrounding jury instruction which we have set forth, the rationale of the Fifth Circuit in Schilleci, supra, is clear. Written instructions given after an oral charge, while not favored, will not be grounds for reversible error if the court takes precautions not to highlight this portion of the charge. However, reversal shall be mandated where the court fails to instruct the jury that said written portion must only be considered along with its oral instructions which have previously been given. Only then can we be sure that the jury has avoided the danger of over-emphasizing any one part of the charge.

In the present case, the Court had already instructed the jury as to all areas of culpability which included a definition of the substantive act of distribution of a controlled substance and possession of a controlled substance, a description of the concept of aiding and abetting a crime, and a warning of the necessity of the government's proving each and every element of the substantive crime.

It is hard to imagine an instance where the submission in writing of a partial charge in writing without a warning to apply said charge to the oral charge as a whole presents more of a danger than in the area of conspiracy liability. It is this danger that United States v. Schilleci, supra, seeks to avoid.

The Petitioner respectfully contends that the cases cited in the United States Court of Appeals for the Third Circuit clearly indicates a difference of opinion between that circuit and the Third Circuit in their deciding the case at hand. A standard must be established as to whether or not the Court should apply a case by case analysis and to retain discretion in determining whether or not partial written instructions are proper or whether such instructions, in and of themselves, are proper and, therefore, grounds, in and of themselves, for a new trial. It is Petitioner's contention that this Court should set a standard requiring a mistrial or, when proper, a new trial if the jury is submitted partial written instructions without at least some precaution as to the weight to be given the written instructions versus the previous oral instructions. Thus, the Petitioner would contend that this Court should exercise its power of supervision to resolve the dispute between the various circuit courts of appeals and to establish a standard for review in further cases.

III.

Finally, it is Petitioner's contention that the District Court has decided a Federal question in a way which is in conflict with the applicable decisions of the United States Supreme Court.

The Petitioner's contention relative to the sentencing hearing is that the District Court based its decision upon information which was totally inconsistent with the testimony produced at the time of trial and based upon information provided by the government at the time of sentencing, which was completely inaccurate. The District Court permitted the government to display to the Court certain items that had been found in Petitioner's briefcase, none of which had been introduced during the trial, but which consisted of the following:

(a) an article from the Greensburg Tribune-Review newspaper dated July 15, 1980, setting forth an article entitled "Alleged Mafia Boss Buried"; the prosecution contending that pictures of the funeral indicated many people and what appears to be John Scalzitti;

(b) the second item was a photograph of the summer residence of Gabriel Kelly Mannerino;

(c) an article from Parade Magazine dated August 10, 1980, written by Jack Anderson titled, "The Life and Trials of Carlos Marcello";

(d) an envelope addressed to Mr. Scalzitti in care of John's Oldsmobile Cadillac from John Bazzano who, the prosecution contended, was incarcerated and whose name was prominent in the 1980 Pennsylvania Crime Commission Report, and an envelope containing the name

and telephone number of an individual known as Ciannuti, who is alleged to be a member of organized crime.

In addition, during a statement by Mr. Antkowiak for the government, he contended, in effect, that Petitioner is a major mover and a person who had contacts, the know-how and the wherewithal to in effect be in a position to control large drug trafficking. The United States Attorney further contended that by reason of the introduction of those items set forth above from Petitioner's briefcase, that this indicated a total disregard for the law, and that he had a morbid fascination with organized crime.

We would point out that the offense charged was with regard to approximately one ounce of cocaine and that the evidence and the tapes introduced by the government during this trial was to the effect that Petitioner was not able to supply large quantities of drugs and, in fact, had extreme difficulty in financing or obtaining even the one ounce which was the subject of this prosecution. Further, it is quite obvious that the whole purpose of the prosecution's presentment of materials at the time of sentencing was for the sole purpose of influencing the District Court in its basis for sentencing by making the Petitioner appear, if not an acknowledged member of organized crime, one who had extremely close ties with "organized crime". The very word "Mafia", particularly where applied to a man of Petitioner's ethnic background, is incapable of being answered, and it is very obvious that the District Court relied heavily on the representations of the United States Government since that fact was one of the bases for the District Court's sentence, where the Court stated that the reputed ties to organized crime was very, very troubling to the Court.

The United States Supreme Court, in the case of United States v. Tucker, 404 U.S. 443 (1972), held that when information is used as a basis for sentencing which was materially untrue and the information was based upon assumptions which were incorrect, then and in that event, the Petitioner is entitled to another sentencing hearing without such inferences or information. Mr. Justice Stewart, in his Opinion, noted that:

> ". . . For we deal here not with the sentence imposed in the informed discretion of a trial judge, but with a sentence founded at least in part upon misinformation of constitutional magnitude. As in Townsend v. Burke, 334 U.S. 736, 92 L.Ed 1690, 68 S. Ct. 1252, 'this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue'."

Even though Mr. Justice Blackmun, along with the Chief Justice, dissented in the Tucker case, it was clear that the dissenters agreed with the exposition of the abstract law. See, United States v. Tucker, 404 U.S. 443 at 449.

The Petitioner in this matter was never given an opportunity, nor had the ability, to controvert any of the alleged associations that existed and, in fact, when such inflammatory descriptions as "Mafia" are used, there is such prejudice that results which cannot be cured nor controverted that the Petitioner has not had an impartial sentencing hearing, and that the evils which the Court in Tucker attempted to preclude have, in fact, occurred in this case.

The Petitioner's contention is that the District Court has, in its consideration of the material as presented by the United States Government, refused to abide by the United States Supreme Court's decision in Tucker, and has departed from any accepted and usual course of judicial proceeding. The possibility of further refusal by the district courts to abide by the decisions of this Court are extremely prevelant in the now present over-zealous pursual of criminals and also in the strenuous efforts of the government to obtain maximum sentences in each and every case.

Therefore, the Petitioner would respectfully submit that this Court should address itself to the issues as they relate to the sentencing hearing and as they apply to this Petitioner.

CONCLUSION.

For the foregoing reasons, Petitioner respectfully requests that a Writ of Certiorari be granted directed to the Court of Appeals for the Third Circuit for review of the instant decision.

Thomas R. Ceraso
Attorney for Petitioner

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2730

UNITED STATES OF AMERICA

v.

JOHN SCALZITTI, LOUIS RAUCCI,
and ROBERT ALLEN WELDON a/k/a
Bobby Allen

John Scalzitti,
Appellant

(D.C. Criminal No. 81-00042-01

No. 81-2731

UNITED STATES OF AMERICA

v.

JOHN SCALZITTI, LOUIS RAUCCI,
and ROBERT ALLEN WELDON, a/k/a
Bobby Allen

Robert Allen Weldon,
a/k/a Bobby Allen,
Appellant

(D.C. Criminal No. 81-00042-03

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued: May 14, 1982
Before: GIBBONS and HUNTER, Circuit Judges and GERRY, District Judge*

---

*Hon. John F. Gerry, United States District Judge for the District of New Jersey, sitting by designation.

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JUDGMENT ORDER

John Scalzitti and Robert Allen Weldon appeal from judgments of sentence following their conviction of violation of 18 U.S.C. §§ 846 and 841(a)(1). Both contend:

(1) that the court erred in permitting the government to prove that the witness Charles Hindmarsh had made a conditional plea bargain in which he agreed to testify truthfully;

(2) that the court erred in taking judicial notice that cocaine is a controlled substance; and

(3) that the court abused its discretion in submitting a part of its charge to the jury in writing.

Scalzitti also contends that the court violated due process in relying on his alleged connections with organized crime when imposing sentence.

We find no merit in these contentions.

It is O R D E R E D and A D J U D G E D that the judgments of the district court are affirmed.

BY THE COURT:

/S/ John J. Gibbons
Circuit Judge

Attest:

/S/ Sally Mrvos
Sally Mrvos, Clerk

DATED: May 17, 1982.

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No. 82-98

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOHN SCALZITTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial court properly admitted evidence about a cooperation agreement between the government and an informant.

2. Whether the trial court properly submitted additional instructions in writing to the jury.

3. Whether the trial court considered improper information in sentencing petitioner.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. 26) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1982. A petition for a writ of certiorari was filed on July 16, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted of conspiring to distribute cocaine hydrochloride (Count 1) in violation of 21 U.S.C. 846, and of possessing with intent to distribute and unlawfully distributing cocaine hydrochloride (Count 2) in violation of 21 U.S.C. 841(a)(1). Petitioner was sentenced to five years' imprisonment on

Count 1 and five years' imprisonment and three years' special parole on Count 2, the sentences to run consecutively.[1]

The evidence at trial showed that one Charles Hindmarsh, a government informant known to petitioner through a prior drug transaction, arranged a meeting in Greensburg, Pennsylvania on January 30, 1981, between petitioner, Robert Weldon, and FBI Agent Mike Wolf, who (with Hindmarsh) was posing as an agent of one Lenny Marcharella.[2] At the meeting, Hindmarsh expressed Marcharella's desire to set up a "connection" with petitioner for the purchase of a large quantity of cocaine (Tr. 187). Petitioner assured Hindmarsh and Wolf that he could provide large quantities of high quality cocaine at varying prices, depending upon the location of the delivery point (Tr. 188, 194-195). Petitioner required, however, that the negotiations for the purchase of the first kilogram of cocaine be conducted in Florida (Tr. 206).

Accordingly Hindmarsh travelled to Florida on February 5, 1981, but was unable to contact petitioner. Two weeks later, at a meeting in Greensburg, petitioner and

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[1]Petitioner's co-defendant, Robert Weldon, was also convicted on Counts 1 and 2, and on an additional count of possession of cocaine with intent to distribute. Weldon's convictions were also affirmed by the court of appeals.

[2]Hindmarsh's cooperation was the result of a plea arrangement whereby pending wire fraud charges were to be either dismissed or reduced to a probationary term (Tr. 63). The FBI and the Drug Enforcement Administration had enlisted Hindmarsh's assistance in their investigation of drug-related activities of Lenny Marcharella (Tr. 68). (Some citations to the trial transcript ("Tr.") refer to pages where tape recordings—not transcribed—were played for the jury. Citations to the sentencing hearing transcript ("S. Tr.") are based on record references in the government's brief in the court of appeals.)

Hindmarsh discussed the problems delaying culmination of the cocaine transaction and made arrangements to meet again on February 26.

At the February 26 meeting, conducted in a motel in Monroeville, Pennsylvania, petitioner introduced his associate, Lou Raucci. After the parties reached an agreement concerning the cocaine transaction, Hindmarsh asked for a sample to show his supposed principals (Tr. 304). Raucci responded that he would make a call to New York (*ibid.*), and Raucci and petitioner then left the motel. Ten minutes later, petitioner returned and announced that he had arranged for Hindmarsh to receive a sample (Tr. 309).

At a final meeting on March 5, 1981, Hindmarsh met with petitioner and Weldon at the same motel. Petitioner gave Hindmarsh a sample of the cocaine, and petitioner and Weldon left the motel. A subsequent FBI analysis of the cocaine revealed, however, that it was not of the high quality promised by petitioner.

Within a few hours Hindmarsh and an FBI agent, posing as the person who had tested the cocaine, met with petitioner to discuss the cocaine's poor quality. Petitioner offered to take the sample to an "expert" to have it analyzed, and the FBI agent and Hindmarsh then left (Tr. 375). Petitioner and Weldon were arrested as they left the motel.

ARGUMENT

1. Petitioner contends (Pet. 10-15) that admission of a portion of Hindmarsh's cooperation agreement, which required that he testify truthfully, constituted improper vouching for his credibility as a witness. This argument is without merit.

During its direct examination of Hindmarsh, the government asked him whether he was testifying pursuant to an immunity agreement. When he confirmed that he was,

counsel for petitioner requested that a portion of the agreement conditioning immunity on truthful testimony not be revealed to the jury. The portion of the agreement quoted by petitioner (Pet. 6) was not in fact read in open court (Tr. 62). The district court did, however, permit testimony concerning the terms of the plea agreement, concluding that complete disclosure was necessary to permit the jury to assess adequately the witness's credibility. The government elicited testimony from Hindmarsh as to his interpretation and understanding of the plea agreement (Tr. 59-65).

A prosecutor may not inject his personal opinion on the credibility of a witness. *Lawn* v. *United States*, 355 U.S. 339, 359-360 n.15 (1958). The principal reason for this rule is the concern that the jury will infer that the prosecutor has an independent basis, apart from the evidence introduced at trial, for crediting the witness's testimony. In determining whether a prosecutor has vouched for the credibility of a witness, a court must determine whether the jury could reasonably believe that he indicated a personal belief in the witness's credibility. See, e.g., *United States* v. *Bess*, 593 F.2d 749, 756-757 (6th Cir. 1979); *United States* v. *Ellis*, 547 F.2d 863, 869 (5th Cir. 1977); *Orebo* v. *United States*, 293 F.2d 747, 749 (9th Cir. 1961), cert. denied, 368 U.S. 958 (1962).

In cases where a prosecutor has either elicited from a witness or revealed to a jury the terms of a cooperation agreement, the courts of appeals have consistently upheld the admission of such evidence against claims of improper vouching. See *United States* v. *Arroyo-Angulo*, 580 F.2d 1137, 1146 (2d Cir.), cert. denied, 439 U.S. 913 (1978); *United States* v. *Edwards*, 631 F.2d 1049, 1052 (2d Cir. 1980) (the government may introduce such a plea agreement on redirect examination after the witness's credibility has been attacked, and may introduce such evidence on

direct examination if it is clear that the witness's credibility will be attacked); *United States* v. *Creamer*, 555 F.2d 612, 617 (7th Cir.), cert. denied, 434 U.S. 833 (1977) (questioning a government witness on direct examination about the agreement's requirement that he speak truthfully did not bolster the witness but, rather, established the pressures under which the witness was testifying); *United States* v. *Miceli*, 446 F.2d 256, 261 (1st Cir. 1971) (prosecutor's reference in closing argument to witness's arrangement with the government to testify truthfully was not plain error); *United States* v. *Rosson*, 441 F.2d 242, 244 (5th Cir.), cert. denied, 404 U.S. 843 (1971) (prosecutor is allowed to elicit full terms of the agreement on redirect after witness's credibility is attacked on cross-examination). As petitioner points out (Pet. 11), the Ninth Circuit has expressed concern that a jury might construe a plea agreement containing a promise to testify truthfully as improper vouching by the government. But that court has declined to prohibit evidence of such a promise. Instead, it has stated that the "trial court should be alert to the problem of vouching before admitting * * * [evidence of the promise and] should consider the phrasing and content of the promise to ascertain its implications and decide whether an instruction to the jury would dispel any improper suggestions." *United States* v. *Roberts*, 618 F.2d 530, 536 (9th Cir. 1980).

The government does not vouch for the credibility of a witness by merely offering in evidence the witness's testimony about his understanding of an agreement's implications. As the Second Circuit noted in *United States* v. *Arroyo-Angulo*, *supra*, 580 F.2d at 1146, the existence of a cooperation agreement is a "double-edged sword and it is debatable which edge cut[s] more deeply." While it suggests that the witness has a motive to be truthful, it also indicates that he may feel a need to please the government with testimony favorable to its case. Hence, admission of the

whole agreement, including the promise to be truthful, effectively balances the interests of the government and the defendant by revealing all the witness's possible motives.

This is what transpired in petitioner's trial. The government introduced the agreement, not to vouch for Hindmarsh's testimony, but as an indication of the conflicting pressures under which he was testifying. The jury was clearly entitled to consider and evaluate any interest that Hindmarsh may have had as a consequence of the plea bargain so as not to be misled about its terms or importance. See *United States* v. *Rosson, supra*, 441 F.2d at 244.[3]

2. Petitioner next contends (Pet. 16-18) that the district court abused its discretion in submitting to the jury a written copy of a portion of its instructions, after the jury expressed confusion with part of the charge concerning conspiracy. Petitioner complains that the submission of the written instruction prejudiced his case by stressing that portion of the charge. The court of appeals properly declined to find an abuse of discretion.

As this Court has explained, "[w]hen a jury makes explicit its difficulties [with a closing instruction,] a trial judge should clear them away with concrete accuracy."

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[3]Petitioner further contends (Pet. 14) that the prosecutor impermissibly vouched for Hindmarsh in his summation, during which he argued that Hindmarsh had a great deal to lose if he lied. Because the closing argument was not transcribed, we are uncertain about the nature of the prosecutor's references to the plea agreement in closing argument, and whether petitioner objected to such references. In any event, such an argument would be proper. A comment by the prosecutor in closing argument that a witness would be subject to indictment for perjury if he lied does not constitute improper vouching, but rather is a permissible argument that the witness, whose credibility has been attacked, had some motive to testify truthfully. *United States* v. *Ricco*, 549 F. 2d 264, 274 (2d Cir.), cert. denied, 431 U.S. 905 (1977); *United States* v. *Arroyo-Angulo, supra*, 580 F.2d at 1147.

Bollenbach v. *United States*, 326 U.S. 607, 612-613 (1946). Here the trial court cleared away the jury's confusion about the elements of conspiracy by submitting a written copy of a portion of his original charge. Supplemental instructions reiterating exactly those parts of the original charge requested by the jury have been determined to be adequate. See, e.g., *United States* v. *Blevins*, 555 F. 2d 1236, 1239 (5th Cir. 1977), cert. denied, 434 U.S. 1016 (1978); *United States* v. *Chatham*, 568 F.2d 445, 451 n.10 (5th Cir. 1978).

Petitioner notes (Pet. 17) that the district court should on occasion instruct the jury not to emphasize the supplemental charge over the original instruction as a whole. Failure to give such an instruction is not reversible error by itself, however, but is only one factor to weigh in assessing possible prejudice to the defendant from a supplemental charge that unduly emphasizes the government's case. *United States* v. *Sanfilippo*, 581 F.2d 1152, 1155 n.3 (5th Cir. 1978). The supplemental charge here did not display any partiality to the government's case, but rather responded exactly to the jury's request. Moreover, since petitioner made no request that the trial court charge that the supplemental instruction be considered together with the instructions as a whole, he has no valid basis for complaint.

3. At the sentencing hearing, the government offered testimony as to certain documents found in petitioner's briefcase, including certain newspaper articles about organized crime and a letter from one John Bazzano. The government also introduced the 1980 Pennsylvania Crime Commission report, in which petitioner was mentioned and Bazzano was mentioned prominently (S. Tr. 19-21). Petitioner claims (Pet. 19-22) that the district court should not have considered this information in determining the sentence.

In imposing the sentence, the district court stated as follows (S. Tr. 32-33):

> [T]here is no doubt on March 5, 1981 you sold to a man whom you did not realize at the time was an FBI agent a quantity of 100 per cent pure cocaine, and during the negotiation leading up to that transaction you bragged consistently you could deliver enormous quantities of this drug. The impact of that amount of drugs in a community is difficult to imagine. In your drug dealings you have also unfortunately enticed another individual to join you in this crime. Your reputed ties to organized crime are also very, very troubling to me.
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> Because of the danger you present by the possibility of being able to unleash into a community such a large quantity of very dangerous and debilitating drugs, I have decided that a substantial prison term is in order.

These remarks show that the district court placed primary emphasis on the testimony at trial, including petitioner's self-proclaimed ability to deliver large quantities of cocaine. As to the evidence presented at the hearing, petitioner implicitly concedes—as he must—that the sentencing court could consider more than the criminal act itself, and in particular could take into account petitioner's character and propensities. Cf. *Pennsylvania* v. *Ashe*, 302 U.S. 51, 55 (1937). It is also well settled that, in imposing sentence, the court may rely on hearsay and other evidence that would be inadmissible at trial. 18 U.S.C. 3577; *Williams* v. *New York*, 337 U.S. 241 (1949); *Roberts* v. *United States*, 445 U.S. 552, 556 (1980).

A sentence may not be imposed on the basis of materially false information, but petitioner nowhere states that the evidence of his associations with members of organized

crime was materially false. In any event, as the record demonstrates, in imposing sentence the court relied primarily on petitioner's actions during the commission of the crime.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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